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IN THE

UNITED STATES

CICUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NELLIE M. RININGER and HELEN DOROTHY RININGER, a minor, by A. S. KERRY, her guardian,
Plaintiffs in Error,
vs.
PUGET SOUND ELECTRIC RAILWAY CO., a corporation,
Defendant in Error.

No. 2450

REPLY BRIEF *of* PLAINTIFFS IN ERROR

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ARGUMENT AGAINST MOTION FOR DISMISSAL.

The defendant in error has interposed a motion to dismiss the writ of error in this cause, because plaintiffs in error have not complied with the rule announced in *Masterson vs. Herndon,* 10 Wall. 416; *Ayres vs. Polsdorfer,* 105 Fed. 737; *Ibbs vs. Archer,* 185 Fed. 37, and the other decisions cited on page 7 of the brief of the defendant in error.

The complaint joined as defendants in this action the Puget Sound Electric Railway Company, a corporation, and the Puget Sound Traction, Light & Power Company, a corporation, on the theory that the two companies were owners and operators of the interurban railway which caused the death of Dr. Rininger. The record shows that the Puget Sound Electric Railway Company filed a separate answer admitting its ownership of and that it was operating this interurban railway, but denied liability and also pleaded the defense of contributory negligence. This answer was complete in itself, and made no reference to its co-defendant. It is reasonably apparent from the record that the Puget Sound Traction, Light & Power Company also filed a separate, independent and complete answer denying liability, and also denying that it was interested in the ownership or operation of said railway company. Upon the trial, plaintiffs in error were not able to produce any evidence that connected the Puget Sound Traction, Light & Power Company with the ownership or operation of said railway, and thereupon at the close of the testimony of plaintiffs in error, said defendant, Puget Sound Traction, Light & Power Company, moved "that a judgment of nonsuit be directed in its favor on the ground that it had been in no way connected with the ownership or the operation or management or control of the inter-

urban railway." (Rec. 107.) This motion was granted without objection (Rec. 107). The granting of this motion was in legal effect a judgment dismissing such defendant from the action. That this was so considered by all the parties is shown by the language of the motion made by defendant in error at the close of the introduction of all testimony for a directed verdict, which is as follows: "If the court please, the only remaining defendant in the case, the Puget Sound Electric Railway Company, now moves the jury be instructed to return a verdict in favor of the defendant and against the plaintiffs" (Rec. 243). This motion was granted (Rec. 250). Thereupon, a directed verdict was returned by the jury, in which both defendants were, by oversight, named. The opinion of the court (Rec. 244-250) shows clearly that only the defendant embraced in the last motion was being considered. Thereupon, a judgment of dismissal and a separate judgment for costs in favor of each defendant was entered.

The rule announced in *Masterson vs. Henderson, Ayres vs. Polsdorfer* and *Ibbs vs. Archer,* and, in fact, in all of the cases cited in support of the motion to dismiss, is "where the judgment is joint, all the parties *against* whom it is rendered must join in the writ of error or appeal," and "where a

judgment or decree is rendered *against* two or more jointly, all must join in suing out the writ of error."

In nearly all of the cases cited is given the reason for this rule, which is that the case shall not be submitted to the appellate court by piecemeal by allowing one joint judgment debtor to sue out one writ of error and another likewise sue out another writ of error, thereby multiplying the work of the court requiring separate hearings, and this result is avoided by requiring that all persons *against* whom a joint judgment is rendered shall either join in one writ of error or be brought before the court by summons and severance, and they must then either join in the writ of error or be precluded from thereafter suing out a writ of error on their own behalf. In the case at bar, the joint judgment was rendered *against* Nellie M. Rininger and Helen Dorothy Rininger, a minor, by A. S. Kerry, her guardian, and in no respect is this a joint judgment except as against these plaintiffs in error, and they have all joined in the writ of error. If either Mrs. Rininger or her daughter, Helen Dorothy Rininger, had failed to join in the writ of error, then counsel's motion would be apropos. A casual inspection of the cases cited by counsel shows that in each instance the judgment was a joint one *against* several parties and only one of the judgment debtors sued out a writ of error.

An affirmance or reversal of this cause can in no manner affect the judgment of the lower court in favor of the Puget Sound Traction, Light & Power Company.

In naming defendants in a writ of error, it is only necessary to join those who would be injuriously affected by a reversal of the case.

Foster's Fed. Proc., 3rd Ed. 2, Vol. 1220.

Baskett vs. Hassett, 107 U. S. 602.

Parties whose interests will not be affected by the result in the appellate court need not be parties plaintiff or defendant to the writ of error to the appeal.

Milner vs. Meek, 95 U. S. 252.

Kohler vs. Allen, 114 Fed. 609.

Reed vs. Pawly, 121 Fed. 652.

Mills vs. P. L. & T. Co., 100 Fed. 344.

Amadio vs. Northern Ins. Co., 201 U. S. 193.

In *Postal Telegraph Company vs. Vann,* 80 Fed. 961, there was but a single plaintiff in the lower court, and it was not joined either as a plaintiff or defendant on the appeal, yet the appeal was sustained for the reasons given above.

Furthermore, this was not a joint judgment in favor of two defendants. It was a dismissal of the action with a separate judgment for costs in favor of each defendant. Either defendant could claim the benefit of this judgment independently of the other.

While the decree may be joint in form, but in law or in fact severable, the mere form of the decree will not make it a joint judgment.

Hanrick vs. Patrick, 119 U. S. 156.

The "New York," 104 Fed. 561.

> "A judgment must be regarded as joint only in form, but severable in fact and in law. It is to be read as if it were based upon a finding that the plaintiffs recover as against the defendant for the title asserted against him, and against the intervenors in respect to the title asserted by them against the plaintiffs. The judgment for costs is in fact separated."

Hanrick vs. Patrick, supra.

Inasmuch as no objection was made to the granting of the motion for judgment of non-suit against the Puget Sound Traction, Light & Power Company, it would be treated as a consent judgment, and no relief could be obtained on writ of error to this court against such a judgment, and if that company had been joined as a defendant in error, this court would be obliged to affirm the judgment as against it, and the plaintiffs in error would

be mulct in costs. Furthermore, we have no grievance against the judgment dismissing the Puget Sound Traction, Light & Power Company.

We assume that it will be unnecessary for us to cite authorities authorizing one to appeal or obtain a writ of error from a portion of an adverse judgment or from a judgment where severable relief is granted in favor of several parties and a review is sought of such portion of the judgment as affects but one of the parties in favor of whom such judgment was rendered. We respectfully submit that the motion for dismissal should be denied.

RELY ON THE MERITS.

A considerable portion of the brief of defendant in error is given to a discussion attempting to demonstrate that the defendant in error was not guilty of any negligence, and, in order to make application of several authorities quoted, a very unfair statement and marshalling of the evidence has occurred, and consequently we must be permitted to, in a measure, review the authorities of defendant in error and the evidence disclosed by the record.

Defendant in error cites several authorities to sustain the contention that a train may be operated at any rate of speed through country districts, and then covertly claims that the scene of the accident was in the country.

As we have previously pointed out, this was a main thoroughfare crossing the tracks at Riverton. The traffic was very heavy and congested, and during the summer time was practically continuous. There was a business community in the locality of this crossing and a passenger and freight station at that point. It was adjacent to a large city and the thoroughfare was the only southern outlet from this city through a thickly settled community to another large city. In no sense could the Riverton crossing be considered a country district.

The cases cited by counsel practically all, with one exception below noted, deal with conditions pertaining to ordinary country road crossings out in the open country where the travel was very light and where no obstructions intercepted the immediate view of the trains.

In *Dubois vs. Railway Company,* 34 N. Y. S. 276, the crossing involved was in a small town, not on a main thoroughfare, and where the traffic was light.

While railways have the right to operate their trains at a high rate of speed, yet if trains so operated cross main thoroughfares or public highways with considerable traffic thereon, then it becomes the duty of the railway company to provide safeguards to protect the public so using such thoroughfares from danger. This was a dangerous crossing; not only was it dangerous because of the vast amount of traffic crossing it and the frequency of passing trains, but also because of the local conditions. The highway on the east side of the tracks made an abrupt turn to the westward to cross them, while on the west side there was a bluff which prevented travelers, approaching the track from the west, from seeing the tracks north of the crossing until they were within less than 50 feet of it. The curvature of the high bank diverted the sound of signals or rumble of the train so those on the highway west of the tracks could not readily hear it. All these things combined made it a dangerous crossing, and as these conditions had existed for several years, they must have been fully known to defendant in error. Consequently, if it desired to operate its trains at a high rate of speed over this crossing, it was charged with the duty of maintaining safeguards to protect travelers from being injured by such trains.

"We hold that it is the duty of railroad companies in crossing public highways at grade to use all reasonable care to avoid collisions and provide for the safety of travelers who enjoy thereon privileges in common with them; that the degree of care varies with the character of the crossing; whether the view be free or obstructed by trees, fences, buildings or the natural configuration of the land—with the use made of the railway by the traveling public and with the speed and frequency of pasing trains."

Penn. Railway vs. Miller, 99 Fed. 531.

"The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell, and this action is especially applicable when that sound is obstructed by winds and other noises and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable watchmen should be stationed at the crossing."

Continental Company vs. Steed, 95 U. S. 161.

"It is very probable, we think, that if a flagman had been stationed at the crossing in question the injuries complained of would not have been sustained and so the jury evidently concluded. We have no fault to find with their conclusion. We think that the trial court properly submitted the issues, as to defendant's negligence in failing to station a flagman at the crossing, to the consideration of the jury."

C. G. W. Ry. vs. Kowallski, 92 Fed. 310.

The foregoing citations are excerpts taken from cases cited on page 21 of our opening brief.

Upon examining all of the cases previously cited by us, it will be observed that the rule is firmly

established in the federal courts that, while a railroad company may, in the operation of its business, run its trains at a high rate of speed, yet if, in so doing, it is obliged to cross public thoroughfares at grade that are much frequented and where the local conditions tend to prevent the traveler from readily seeing such trains, then it is the duty of the railroad company to either slacken its speed or else to maintain safeguards at such crossings to protect the public.

That defendant in error recognized that such an obligation rested upon it is shown by the fact that it had attempted to meet it by installing a mechanical, automatic contrivance which was designed to ring a gong at the crossing. This contrivance, counsel have been pleased to say, was "safer and more dependable than a flagman or watchman could be, for the reason that the element of human frailty, inattention, mistakes and carelessness is eliminated."

It appears that a mechanism was installed 1,220 feet north of the Riverton crossing, which had an electrical connection with the bell on the post, and the shoe of the southbound train would engage this mechanism, thereby cutting in an electric current that set the gong ringing.

It is contended that there was no positive testimony that this gong did not ring as the colliding car passed over the crossing.

Mr. Adams, a witness for defendant in error, who had charge of the bell in 1911, upon cross-examination, reluctantly admitted that he recalled on two occasions during that time that it had failed to operate (Rec. 116).

O. C. Thompson, a merchant and disinterested witness residing at Riverton, stated: "I have observed, during the year 1912 and before this accident, irregularities and failures of this gong to ring when a train was approaching. At times the bell would not ring at all when a train was approaching or otherwise, and at other times it would ring when there was no train coming or otherwise." (Rec. 234.) "I actually observed quite a number of times, between the first day of January and the 25th day of July, 1912, the southbound train approach when the bell failed absolutely to ring, but I could not state definitely how many times." (Rec. 235.)

Counsel for respondent in error refused to permit us to show by Mrs. Springer (Rec. 67) and by the witness, Mr. East (Rec. 81), that this same gong had failed to operate when approaching trains passed it prior to this accident.

Mr. East, a disinterested, matured witness, engaged in a mercantile business, and who was thoroughly familiar with this crossing, was driving towards it at the time of the accident and was within 50 feet of the gong or bell when the collision took place. This bell was 12 inches in diameter and could be heard from 700 to 900 feet. He states: "The alarm gong there at the crossing was not ringing. I am positive of that." (Rec. 79.) "I stood right there under the bell, and if it had been ringing, I would have heard it." (Rec. 84.) He further stated, on cross-examination, respecting this gong: "I know that it does not always start it, and as for stopping it, it could not have stopped if it was not started. I know they don't always ring." (Rec. 85.)

Mr. Lamb, another disinterested witness, whose only crime was that of being a friend of Mr. Brodnix, was standing on the platform at the time of the accident waiting for a nothbound car, and saw the fated southbound car as it left Quarry, and came on by Allentown to Riverton. He also observed the automobile approaching and was observing this gong or bell, as he was only 75 feet from and in full view of it. He states: "The electric gong maintained at the crossing did not ring at that time." (Rec. 90.)

Mr. Herpick, a witness for defendant in error, testified that he was a passenger on this train; that when the train was about 50 feet from the crossing, he was sitting on the side of the car next to the gong, with his head out of the window (Rec. 203), and he states: "I did not hear the electric bell ring as we passed over the crossing" (Rec. 200), and yet his head must have been within ten feet of this bell, which, if ringing, could have been heard at least 800 feet.

Mrs. Springer, who was within 25 feet of this gong when the accident occurred, stated that she did not hear it ring, and that if it had rung she could have heard it, and this is corroborated by Trena Brock. All of these are disinterested witnesses. This is certainly positive testimony and would support a finding of the jury that the gong did not ring.

This testimony is supported by that of Mr. Brodnix, the chauffeur, who was actively and attentatively listening for any sounds that might indicate the approaching train, and also by Mrs. Lyford, who was riding in the automobile.

It is urged by counsel that Mr. Brodnix testified at the coroner's inquest that he heard the bell ringing.

The colliding train was in charge of R. W. Robson, who testified, at the coroner's inquest, held the next day after the accident, as follows, regarding the alarms that he gave as the car approached the crossing:

"Q. You had a bell?
A. Yes.
Q. You didn't ring that?
A. Yes.
Q. You were ringing your bell?
A. I was ringing my bell when I hit the automobile." (Rec. 215.)

And at the trial the witness would not state that this testimony was incorrect.

At the same inquest, Mr. Brodnix testified that as he approached the crossing he saw the train:

"Q. Did you hear the gong or see the train first?
A. I saw the train first.
Q. And after you saw the train, you heard the gong?
A. Yes." (Rec. 57.)

As he was within 30 feet of the gong before he saw the train it could not have been the electric gong on the post that he heard, but it was the gong on the car, being rung by the motorman, and it is not at all surprising that the rapidity of events, their consequences, and the mental shock therefrom did not enable him to locate correctly the gong that he heard.

Opposed to this testimony are the self-serving declarations of those in the direct employ of defendant in error, with the exception of Mrs. Nelson, Mr. Brown, Mr. Somerfield and Mr. Apt, and none of these witnesses testified that their attention was particularly directed at the time to this gong, and some of the other witnesses for defendant in error, who were aboard the train, stated that they did not hear the gong. Mrs. Nelson, Mr. Brown, Mr. Somerfield and Mr. Apt would have no motive in misrepresenting or coloring their testimony; they have no form of employment to protect, and no reputation to shield; they may have heard a gong ringing at the time, but it was the gong on the car that Mr. Robson was ringing which they heard. As a corroborative feature of defendant's testimony, it sought to show that the gong must have rung when this car passed the crossing for the reason that it rang as the other cars afterwards passed by. It will be remembered that the gong is set in motion by a shoe on the car which works with the mechanism north of the crossing. It will be observed that respondent in error was very careful not to offer any evidence that this mechanism on the car was in proper condition; nor did it offer any evidence that the bell always rang when this same car was southbound over this crossing. If the gong was not set in motion by the approaching car, then, of course,

it would not cut it off, when it passed the crossing, as there was nothing to cut out. Inasmuch as there was proof showing that the bell did not ring, and that the contrivance and car to which it was attached were under the control of respondent in error, then the burden of proof was upon respondent in error to show that the contrivance or shoe on this particular car was in perfect working condition. When we recall the great fidelity to detail with which this case was tried by defendant in error we must assume there was but one reason why the condition of the engaging device on the colliding car was not shown.

It is further contended that there was no proof that the whistle was not blown as the colliding car was approaching the crossing. Any warning from the approaching car should have been made under such conditions, and sufficiently timely and near to the crossing to have in fact been a means of warning. Both the deceased and Mr. Brodnix looked and listened for any sounds either whistle or rumble of any approaching car. Their attention was thereby directly fixed on that subject. They heard no whistles or other sounds from the approaching car.

Mrs. Lyford, who was in the automobile, testified that she heard no whistle.

Mr. East, who was also approaching the crossing to pass over it and interested in knowing if there was any approaching train, listened for any whistles or other alarm signals. His attention was thereby directly given to this matter. He heard no whistle (Rec. 79).

Mr. Lamb, heretofore referred to and who saw the train as it came from a point beyond Allentown, heard no whistle, and yet he was looking at and watching this identical car.

What testimony outside of the self-serving declarations of the employees of the defendant in error actually conflict with the foregoing evidence? Except for the motorman there was no testimony on behalf of respondent in error, by any witness, to the effect that they were paying particular attention to or listening for whistles. Mr. Gribben states that the crossing whistle was given at about 3,000 feet north of the crossing (Rec. 218). He further states that he heard no other whistles afterwards.

Allentown was about 1,250 feet north of the Riverton crossing and Quarry, which is at the rock quarry, was another station about 2,000 feet north of that, so that Quarry was about 3,250 feet north of Riverton.

The witness Brown, referred to by counsel, stated: "I heard the whistle blow after we passed the rock quarry, and heard it again when we struck the auto, but I observed no whistles blowing between that time and the time that I heard them up at the quarry." (Rec. 133.)

Respondent in error relies on the testimony of its witness, Mr. Somerfield, but his testimony, with reference to the whistles, was to the effect that he heard the whistles, consisting of four or five blasts, at the crossing when the accident occurred, and before that he had heard the regular crossing whistle, but he did not know whether it was before or after they crossed the Duwamish bridge, which was still farther away from the crossing than Quarry (Rec. 137).

The motorman blew the car whistle when he first saw the auto, which was from 50 to 80 feet before it reached the crossing.

Mr. Rosenberg, an employee of defendant in error, stated that he heard only one whistle from this car, consisting of four blasts, when the car was about 200 feet away (Rec. 143). This must have been the whistles that were given by the motorman when he discovered the automobile.

The testimony of Mr. Overlock is offered as conclusive proof that the whistles were blown. He does not claim that he was waiting or listening for or paying any particular attention to the whistle, and at one point in his testimony states that the whistle might have been blown before they passed Allentown. After the car stopped he went back to the crossing and was there an hour. During that time at least two trains came in and several witnesses testified to the gong ringing, yet he did not hear it (Rec. 122). He further testified that the macadam top of the road was gone and there was no pitch on it (Rec. 122). Although from other testimony it appears that the road had received a new pitch and screening top but a few weeks before. All of which indicates that his evidence is largely conjecture.

We cannot fail to call attention to the remarkable evidence of the conductor, Gribben. He states that while he was pursuing his usual duties in collecting fares, he heard the regular whistles. He then proceeded with his work, and entered the front vestibule about the time that the motorman discovered the approaching automobile. He did not hear the whistles that the motorman was then blowing, although he states that the blowing of a whistle at that time was an unusual occurrence and he was

directly under it. Yet he claims to have heard the alarm gong ringing as he passed the crossing.

Having in mind all these conditions, it can be said that none of the authorities cited by counsel for respondent on page 39 of their brief have any application to this case.

In the case of *Northern Pacific Railway vs. Freeman,* 174 U. S. 379, cited by counsel in support of another point, this language is used by Justice Brown:

> "There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiff's witnesses were so located that they would probably have heard the whistle if it had been blown, there was a conflict of testimony with respect to defendant's negligence, which was properly left to the jury."

Here we have the evidence of at least three witnesses whose attention was particularly directed to ascertain if the whistles on any approaching car were being blown, all affirming that no whistles were blown. Consequently, this case falls within the exceptions specified in *Keiser vs. Railway Company,* cited by counsel. In addition we have the testimony of the other witnesses who state they did not hear it.

The statement of the facts alone in *Culhane vs. Railway Company,* wherein it appears that two witnesses for plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal, clearly distinguishes that case from the one at bar.

In *Horn vs. Railway Company,* cited by counsel, there were no witnesses who denied that the whistle was blown, but some merely stated that they did not hear it and were some distance away.

We believe that a fair interpretation of the evidence, with reference to the subject of these whistles, is that the whistle was blown 3,000 feet, or more than a half mile, north of Riverton. It is within the common knowledge of every one that the air whistle on an electric car cannot be heard nearly so far as a steam whistle, and when we have in mind that a traveler approaching the crossing from the west would have his view obscured by the intercepting bluff until he came within a short distance of the crossing, and the further fact that the bank deflected the sound, we do not believe that even counsel will contend that a whistle blown 3,000 feet, or over a half mile, north of this crossing, by a car running 35 to 40 miles an hour, is a timely signal or warning of the train's approach. It goes without saying that any signal or whistle to be effectual must

be given sufficiently near to this crossing to afford a warning to one approaching the crossing from the west. If, in considering the testimony relating to the giving of the whistle on this car, we eliminate the self-serving testimony of the employees of defendant in error and also bear in mind that the attention of the witnesses for defendant in error was not directly concentrated at the time on the matter of the whistles, while the tesimony of nearly all of the witnesses for plaintiff in error was at the time directed toward ascertaining if any whistles were being blown, we cannot escape the conclusion that the preponderance of the testimony established that no warning or timely whistles were blown.

We, therefore, submit that the testimony was abundant, if not conclusive, that defendant in error was guilty of negligence in the operation of this car, which was the cause of Dr. Rininger's death.

DR. RININGER AND HIS CHAUFFEUR NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

In presenting this phase of the controversy, counsel have again been very unfair in their statement of the evidence in the record. Inasmuch as

this court will read the testimony, we shall not attempt to point out all of the glaring inaccuracies or garbled statements in their brief.

At the risk of repeating to some degree the statements contained in our opening brief, we feel obliged to call the court's attention to a few facts before discussing the authorities presented by counsel. The conditions at this crossing were unusual and extraordinary. First, there is a bluff which comes to a point on the west side of the tracks and near the crossing and a traveler approaching the crossing from the west cannot see an approaching car from the north until he is within a short distance of the track. This bluff continues northward on a curve contiguous and parallel to the tracks for a distance of over 2,000 feet. It is a precipitous bank and is a sounding-board deflecting the rumble and whistles of approaching cars to the east, thereby rendering it difficult for one approaching the crossing to hear the approaching car until it is directly at the crossing. Furthermore, as the eastbound traveler passes the point of the bluff described, he readily sees both of the tracks at Allentown and for perhaps 200 feet south and also several hundred feet north of that point, and he can see the east track nearly all of the way. Yet at that moment a southbound car can be approaching the crossing within

from 200 to 800 feet and not be visible, and none of these misleading conditions are observable. Consequently, for any increased duty on the part of the traveler to use his senses to ascertain any apparent dangers, there is a corresponding increased duty on the part of the railway company to exercise greater caution in operating its trains over this crossing to avoid these unseen dangers to the public. Where there are unseen dangers or dangers that are not apparent to the ordinary observer, one cannot be expected to guard against them, but where the dangers are known or are plainly observable, then one must exercise reasonable prudence and diligence to avoid such apparent and known dangers. Having these principles in mind, we will consider the various cases cited by counsel, and it will be seen that none of them announce a different rule than that shown in our opening brief.

In *Railroad Company vs. Houston,* 95 U. S. 697, the deceased lived in a house adjoining the railroad tracks for some time, and from her house there was a clear view of the tracks to the west for a distance of three-fourths of a mile. While she was crossing this track on the private right-of-way of the railroad company, where she had no right to be, on a clear moon-light night, a train from the west, with a bright headlight on the engine and the train

itself creating a loud noise, struck her, causing her death. The court says: She was bound to look and listen before attempting to cross the tracks in order to avoid the approaching train, and had she used her senses she could not have failed to both hear and see the train which was coming. Nowhere in this decision is it suggested that she should have *stopped* to look and listen.

In *Schofield vs. Railway Company,* 114 U. S. 615, the traveler, in the afternoon, attempted to cross a right-of-way track that he was familiar with, which was in a flat country where there were no cuts, and for 600 feet before he reached the track he had a clear view of it for 70 rods or 1,150 feet, or nearly a quarter of a mile, and was injured by a passing train. From these facts, the court concluded that the traveler had failed to *look* and so failing was negligent. There was no intimtaion that he should have *stopped* for the purpose of looking.

In *Northern Pacific R. R. Co. vs. Freeman,* 174 U. S. 379, the evidence showed that the deceased drove his team toward the crossing with the train in full view, with his head down, and that he looked neither way for the train, and from these facts the court concludes that he neither looked nor listened for the train, and failing so to do was negligent.

In *Horn vs. Railroad Co.,* 54 Fed. 301, the deceased was approaching the crossing in a close covered wagon, which prevented him from seeing approaching trains. The pith of the decision is found in the following sentence (p. 305): "The only inference that can be drawn from these facts is that the deceased neither heard nor saw the coming train, nor did he make any attempt to do so."

In *Shatto vs. Railroad Co.,* 121 Fed. 678, we find that the cause of action arose in Pennsylvania under a very peculiar state of facts. In Pennsylvania, the rule is absolute that one must stop before attempting to pass a crossing. This rule is not observed outside of that district. *C. N. O. & T. P. Ry. Co. vs. Farraw,* 66 Fed. 496, previously cited by us.

In the statement of the facts in *Davis vs. Railway Co.,* 159 Fed. 10, it was admitted that the crossing was a dangerous one; that plaintiff knew of all of such dangers; also knew that the natural conditions surrounding the crossing would prevent him from seeing or hearing the approach of a train, and that no appliances were employed by the railroad company to warn travelers of approaching trains. The statement of these facts disclose that that case is not at all parallel with or an authority for the case at bar.

In *Erie R. R. Co. vs. Schultz,* 173 Fed. 759, the court says (p. 761):

> "It seems clear from the record that he drove upon the tracks, and that he continued to advance absorbed in meditation until his horses were almost up to the track, on which the engine was coming from the east, if they were not already upon it, when he was aroused to his peril by the shout of a man nearby."

It also appears that the watchman at the crossing attempted to warn the injured man of his peril, but he was so absorbed that he failed to hear him. This is such a flagrant case of failing to look and listen as hardly to be cited as an authority in this case, and yet in reversing the case on a question of instructions, it is said: "The trial court was not justified in giving a directed verdict for the company."

The case of *Brommer vs. Railroad Co.,* 179 Fed. 577, arose in the Third Circuit where the Pennsylvania rule applies. This rule requires one approaching a railroad crossing, under any and all circumstances, to stop, look and listen. We have pointed out in our opening brief that this rule does not obtain outside of that circuit. This decision, as well as the one of *N. Y. C. vs. Maidmount,* 168 Fed. 23, were written by Judge Buffington, and stand alone. Other courts have refused to follow his reasoning, as we have heretofore pointed out.

In *C., M. & St. P. Ry. Co. vs. Bennett,* 181 Fed. 789, we find that Bennett was riding on the rear end of his wagon so that he could not see an approaching train until his horses were within one foot of the track, because of obstructions. He had lived for years in the vicinity of this crossing, and was perfectly familiar with its surroundings and all of its dangers, and knowing that he could not see the tracks until his horses reached them and also knowing that the noise of the grinding brakes on the wheels in addition to the noise of the wagon and the horses' feet, would prevent him from hearing, it was held that he had to rely entirely on his sense of hearing, hence should have stopped. If it had appeared when within 60 feet of the track, he could have seen them 1,200 feet away, under circumstances that would lead a cautious man to assume that he could see an approaching train for the entire distance, the court would not have reached the same conclusion.

In *Grimsley vs. Northern Pac. R. R. Co.,* 187 Fed. 587, plaintiff was driving in a town on a public street across a main and a side track. A freight train was standing on the side track. It was a cold, clear day and the engine was emitting clouds of steam and smoke which the wind carried across and over the main track, thereby obscuring the

eastern view of such track for 300 or 400 feet. Some box cars and structures also aided in obscuring this view. The plaintiff wore a cap pulled down over his ears and a fur-lined overcoat, the collar of which was turned up to the bottom of his cap. Plaintiff crossed the side track, passed the freight train, and was proceeding to cross the main track when an express train emerged from the east out of the smoke and steam at a high rate of speed. The court declares that he failed to use his senses of hearing and seeing. Great stress is laid on the fact that before he reached the main track, he could have seen that the view of it was obscured by the smoke and steam of the freight engine, and that such obstructions were not continuous, but were intermittent and temporary, only rising and falling with the wind. There was nothing that could have misled the deceased. He simply failed to look and listen.

In *Northern Pac. R. R. Co. vs. Alderson,* 199 Fed. 735, plaintiffs were driving towards a railroad track in a level country, and as they approached the track the view of it became more or less obscured by growing brush and other obstructions. The plaintiffs were on the lookout for trains and when within 20 or 30 feet of the tracks stopped and listened. Consequently, in considering the case, the

matter of whether the plaintiffs did or did not stop before proceeding across the track was not a point in the case and not essential to the decision, and it cannot be assumed that the language of the court was intended to announce a rule contrary to that stated in *Ives vs. Grand Trunk Ry. Co.* and analogous cases, but on the contrary it clearly was the intention of the court to follow the doctrine of those cases, for it is said (p. 740):

> "We think under the testimony the care and diligence, with which Alderson and wife approached the track before driving upon it, was clearly a question for a jury, and it was not error for the court to leave it to them. This as it respects counsel's theory of an obstructed vision."

In *Bowden vs. Walla Walla Valley R. R. Co.*, 79 Wash. 184, the respondent was approaching the track in an automobile at 20 miles per hour. He was thoroughly familiar with the crossing as he passed over it every afternoon. At a point 100 feet from the track, an approaching car could be seen from 200 to 300 feet away. The top of the automobile was up and so were the side curtains. When respondent was within 150 to 175 feet of the track, he looked both ways but saw no car, but did not look or listen again for approaching cars, but reduced the speed of his automobile to 15 miles per hour. A witness for him, who was on the car,

testified the he saw the automobile approaching the crossing, and that respondent was not looking toward the car and seemed to be unconscious of its approach. The court concludes that respondent failed to look or listen for the car and was, therefore, guilty of contributory negligence. It will be further observed that this case does not declare that the driver of an automobile must stop to look or listen, nor does it hold that approaching the crossing at 15 miles per hour was an excessive rate of speed.

In *Cable vs. Railway Co.,* 50 Wash. 610, Judge Root states:

> "It is the rule in this, as in most states, that a person about to cross the track of a steam railway must stop, look and listen, unless the conditions be such that to do so would avail nothing."

And then declares that the same rule should apply to interurban railways. A careful examination of the decisions of the State of Washington fails to find sufficient warrant for Judge Root's declaration, but in fact it would appear that a contrary rule prevails.

N. P. R. Co. vs. Holmes, 3 Wash. 543;
Ladouceur vs. N. P. R. R., 4 Wash. 38; also
Ladouceur vs. N. P. R. R. Co., 6 Wash. 280;
Baker vs. Tacoma Eastern Ry., 44 Wash. 579.

In *C., G. W. Ry vs. Smith,* 141 Fed. 930, a pedestrian was killed by a backing engine, because he did not look to see if there were any danger. Had he done so, the "locomotive was in such plain view that its approach would have been disclosed by a mere glance along the track in that direction." His failure to *look* for danger was held contributory negligence.

In *Neininger vs. Cowan,* 101 Fed. 787, plaintiff was injured at a railway crossing in the City of Wheeling. He had been thoroughly familiar for years with all of the conditions surrounding the crossing, passing it nearly every day, and there were two ways for passing the tracks, one of which was practically free from danger, and the other more hazardous, and he chose the more hazardous course. When he assumed to adopt the more hazardous route with knowledge of all of its dangers, then there could be no plainer case than in applying the rule that he should exercise such due care and diligence as would be expected of a reasonably prudent and careful man under similar circumstances to stop, look and listen.

We believe that this analysis of the cases submitted by respondent in error discloses that none of them are in conflict with the rule in *Ives vs.*

Grand Trunk Ry. Co., or with the various cases heretofore presented to your attention by us. The facts in none of the cases are parallel with the case at bar. They all proceed upon the express theory that the traveler had full knowledge of all of the dangerous conditions surrounding the crossing, and in order to properly avoid all of such known dangers, the traveler failed to exercise such due care and diligence as would be expected of a reasonably prudent and careful man under similar circumstances.

For the purpose of making it conclusively appear that Dr. Rininger was negligent as a matter of law, a laborious attempt has been made to demonstrate that Dr. Rininger's automobile was approaching the crossing at a speed of 30 miles per hour when the electric car appeared. This is based chiefly upon what counsel is pleased to term "expert" testimony. One of these experts is Mr. Overlock, a banker at the Town of Kent, who states hypothetically that if an automobile weighing 4,500 to 5,000 pounds should skid with locked wheels on a road without any asphalt or pitch and rock screening top for 35 to 40 feet, it must have been going 30 miles per hour. He admits that he never drove or owned an automobile of that size (Rec. 123) and had never seen an automobile weighing 5,000 pounds skidding with locked wheels (Rec. 128).

Another "expert" witness, Mr. Taylor, who likewise stated hypothetically that if an automobile of the size and weight, and under the conditions just stated, should skid with locked wheels for 39 feet, he would judge that it was going at 30 miles per hour. He further stated that one could always make an automobile skid at any speed over 10 miles per hour (Rec. 181).

Mr. DeJarlius, also, stated that if, under such conditions, the automobile skidded 39 feet, it was going 30 to 35 miles per hour, and that an automobile would not skid at all unless it was going over 20 miles per hour.

Mr. Stabler, an employee of one of the defendants, evidently desiring to emphasize this point for his employer, stated that if it only skidded 30 feet, it must have been going 30 miles per hour.

It will be observed that this "expert" evidence was based upon the statement that wheels skidded 39 feet.

The only man who gave any reliable testimony as to the length of those skid marks, and who in fact was the only man who actually measured them on the day of the accident, was the well-known attorney, W. H. Morris, an entirely disinterested person, who says these marks were 21 to 21½ feet

(Rec. 230). Consequently, this expert evidence is of no value, as it was based on a wrong hypothesis.

Mr. Krandall, a disinterested witness, who has been driving and operating automobiles since 1903, and who was familiar with Dr. Rininger's automobile, and who was just as credible and whose testimony was entitled to just as much weight as witnesses for defendant in error, demonstrated that it was not practical to ascertain the speed of an automobile from its skid marks (Rec. 236).

Mr. Lamb, an experienced man, not interested in selling automobiles to the defendant,—in fact he was entirely disinterested,—and whose testimony is worthy of the highest credence, and who saw the collision, states that a Stearns automobile weighing 4,500 to 5,000 pounds, running at the speed he estimated that it was going, which was 12 to 15 miles per hour, under the conditions that then existed at Riverton, could not be stopped under such an emergency within 20 to 25 feet (Rec. 92).

But it is pointed out that Charlie Sharp, a boy only fourteen years old when he saw this collision and who was quite friendly with one of Mr. Rosenberg's boys, who never drove an automobile and had ridden in one only once or twice and who frankly stated that he could not very well tell the rate of speed that it was traveling, testified, eighteen months

after the occurrence, that he thought that the automobile was going 25 or 30 miles. He says, on cross-examination, that he bases this estimate on the skidding which he says was 40 feet. It is hardly expected that rights of parties should be determined by such unreliable testimony.

But reinforcements are sought from the testimony of Archie Apt, who has followed dairying and farming all his life. He states that the only experience in measuring distances that he had was in stepping off spaces for fence posts. He was on the car looking out of the window and when 50 feet from the crossing, he saw the automobile. As the electric car was traveling faster than fifty feet per second of time he could not have had time to more than glance at the automobile from the window. He says that he had not had any experience in judging the different rates of speed at which automobiles run. Should any court accept his estimate of the speed of this automobile made under such circumstances?

While Mrs. Rosenberg says the automobile "was going fast," Mrs. Springer says it was not running fast (Rec. 64).

Is it reasonable to say that the sum of this "expert" testimony, with its unreliable reinforce-

ments, is sufficient to overcome the positive testimony of the eye witness who saw the automobile as it approached the tracks, regarding its rate of speed? But all of counsels' argument to substantiate a high rate of speed for this automobile when the car struck it only demonstrates more clearly the error on the part of the trial court in assuming to determine this fact from the conflicting testimony.

We again repeat that it cannot be said that all men with reasonable minds would reach the conclusion that Dr. Rininger and his chauffeur did not act in the light of their knowledge of the conditions and surroundings of this crossing and its dangers as were apparent to them as prudent men would reasonably act for their safety under similar conditions, and that this question should have been submitted to the jury for its determination.

Respectfully submitted,

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